IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FARMERS INSURANCE COMPANY OF WASHINGTON, a Washington corporation,	)	**No. 26353-3-III**
Respondent,	)	
v.	)	**Division Three**
WILLIAM VUE,	)	
Defendant,	)	
JAMES W. and JUDY D. AASEBY, husband and wife,	)	
Appellants.	)	**UNPUBLISHED OPINION**

Sweeney, J. — The trial court dismissed claims by injured third parties against one of the tortfeasor's insurers. The court concluded that the third parties failed to support their claims against the insurance company and, ultimately, that there was no coverage under the specific policy for the loss. We agree and affirm the trial court's judgment.

FACTS

William Vue drove his car out of a parking lot onto a street and collided with a car driven by James and Judy Aaseby on October 20, 2000. Mr. Vue apparently told Mr. Aaseby that he was insured with Farmers Insurance Company. Mr. Aaseby called Farmers on the day of the accident. Farmers verified a policy number and gave Mr. Aaseby a claim number. Mr. Vue did not make a claim for coverage or notify Farmers that he had been in an accident.

Aaseby v. Vue. The Aasebys sued Mr. Vue for damages in 2003. Allstate Insurance Company insured the car Mr. Vue was driving at the time of the collision. Allstate called Farmers, acknowledged coverage, and defended Mr. Vue.

Mr. Vue told the Aasebys during pretrial discovery that the only policy that might satisfy part or all of a judgment against him was the Allstate policy. The Aasebys never specifically asked Mr. Vue about his Farmers policy.

The parties settled their dispute in 2004. Allstate paid the full limits of its liability coverage, $25,000. The Aasebys then made a claim under their own policy with Grange Insurance for underinsured motorist (UIM) benefits. The lawyer representing Grange asked about coverage under Mr. Vue's Farmers policy during the course of the UIM proceedings. Grange ultimately paid the full UIM benefits available under its policy, $100,000.

The Aasebys then moved to set aside the stipulated order dismissing their suit

against Mr. Vue. Farmers moved to intervene to oppose setting aside the order of dismissal. The court refused to allow Farmers to intervene. It granted the Aasebys' motion and set aside the stipulated order of dismissal.

Farmers v. Vue. Farmers sued Mr. Vue in 2006 for a declaration that its liability policy did not provide Mr. Vue coverage for the claims asserted by the Aasebys. Mr. Vue failed to timely respond to Farmers' complaint, and the court entered a default order and judgment against him. He eventually filed an answer that stated that he did not know whether the Farmers policy covered his accident with the Aasebys.

The Aasebys moved to intervene in the declaratory judgment action. They also moved to set aside the default order and judgment against Mr. Vue, for a declaration of coverage, and for an award of attorney fees. The court permitted the Aasebys to intervene but refused to set aside the default judgment. The Aasebys then filed a complaint in intervention, essentially complaining about what they considered sharp practices by Farmers. They alleged fraud, outrage, estoppel, laches, waiver, and unconscionability. The trial court ultimately concluded that Farmers' liability policy did not cover the car Mr. Vue was driving at the time of the accident and summarily dismissed the Aasebys' complaint.

The Aasebys appeal the following orders in *Farmers v. Vue*: (1) Order Granting Aasebys' Motion to Intervene and Denying Motions to Set Aside Judgment, Affirm

Coverage and Award Attorney Fees; (2) Order Granting Farmers' Motion for Partial Summary Judgment; and (3) Order Granting Farmers' Motion for Summary Judgment and Denying Aasebys' Cross-Motion for Partial Summary Judgment.

DISCUSSION

Outrage and Fraud

The Aasebys contend that Farmers committed outrage and fraud by affirmative misrepresentations and silence. They argue that Farmers committed outrage by waiting six years to file for declaratory relief, by failing to include them in the action, and by opposing their motion to intervene in the action. The Aasebys claim that Farmers committed fraud by aiding and abetting Mr. Vue to defeat coverage in its declaratory judgment action.

We review summary judgment orders de novo. *Tuttle v. Allstate Ins. Co.*, 134 Wn. App. 120, 125, 138 P.3d 1107 (2006). Summary judgment is proper where the record demonstrates that no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. *Id.* at 125-26. We consider only the facts in the record at the time of summary judgment and reasonable inferences from those facts in the light most favorable to the nonmoving party, the Aasebys. *Id.*

The Aasebys may not avoid summary judgment by relying on allegations, opinions, or conclusory statements but must offer specific facts showing that a genuine

issue of material fact exists. *Allen v. Asbestos Corp.,* 138 Wn. App. 564, 569-70, 157 P.3d 406 (2007).

The Aasebys contend that the trial court should not have dismissed their complaint and granted Farmers' motion for summary judgment because they produced prima facie evidence that Farmers committed fraud and outrage.

Fraud. The Aasebys allege that Farmers committed fraud by affirmative misrepresentation and fraudulent concealment. To establish affirmative misrepresentation, the Aasebys had to show nine elements: (1) Farmers represented an existing fact, (2) the fact was material, (3) the fact was false, (4) Farmers knew the fact was false or it was ignorant of the truth, (5) Farmers intended that the Aasebys should act on the fact, (6) the Aasebys were ignorant of the fact's falsity, (7) the Aasebys relied on the truth of Farmers' representation, (8) the Aasebys had a right to rely on the representation, and (9) damages. *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462, 457 P.2d 603 (1969).

The Aasebys contend that Farmers' affirmative misrepresentations included (1) stating that its policy covered the Aaseby-Vue accident, (2) claiming that Mr. Vue's answer to the Aasebys' personal injury interrogatories stated that the only policy that applied to the accident was the Allstate policy, (3) stating that it did not have a duty to produce its policy, and (4) claiming a benefit from the Aaseby-Vue settlement and

release.

The evidence in the record does not show Farmers told the Aasebys that its policy covered the Aaseby-Vue car accident. The Aasebys argue that Farmers represented coverage by giving Mr. Aaseby a claim number and confirming Mr. Vue's policy number. The only facts Farmers represented by providing these numbers were the numbers themselves. We cannot infer from those numbers that Farmers acknowledged that Mr. Vue's policy actually covered the Aasebys' claim. And we are aware of no authority that would require the court to do so; the Aasebys certainly cite none.

The second misrepresentation alleged is that Mr. Vue provided only his Allstate insurance information in response to the Aasebys' request for insurance policies that "may satisfy part or all of a judgment" against him in their tort action against Mr. Vue. Clerk's Papers at 87. First, that was a representation by Mr. Vue, and maybe Allstate, but not Farmers. Moreover, there is no showing on this record that it was incorrect nor is there any showing that Farmers knew anything about Mr. Vue's representation one way or the other.

Next, Farmers had no duty to give anyone a copy of the policy unless and until someone asked for it. And, until the Aasebys intervened in Farmers' declaratory judgment action, no one asked for the policy. Moreover, failing to give the Aasebys a copy of the policy can hardly constitute an affirmative misrepresentation. There is no

representation being made. Finally, regarding the settlement in the Aaseby-Vue litigation, it is difficult to see how Farmers benefiting from that settlement constitutes misrepresentation, assuming they "benefited" from the settlement. Neither our opinion here nor the trial court's summary dismissal of the Aasebys' claims is based on the settlement and release in the Aaseby-Vue personal injury suit.

None of these allegations amount to the affirmative misrepresentation necessary to support a cause of action in fraud. *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996).

The Aasebys next contend that Farmers' "silent misrepresentations" included failing to deny coverage and concealing Mr. Vue's insurance policy during discovery in the *Aaseby v. Vue* litigation. The first contention assumes some duty to deny coverage. But there is no duty to deny coverage unless and until *after* an insured or someone makes a claim for coverage. WAC 284-30-330(5). There is no showing on this record that anyone insured under the Farmers policy ever completed a proof of loss statement or asked Farmers to assume a defense or indemnify a loss. The second contention assumes some duty to produce the Farmers policy. Again, until the declaratory judgment action, no one asked for a copy of the Farmers policy. And that policy was produced when a request was made.

To prove fraudulent concealment the Aasebys had to show that Farmers breached

an affirmative duty to disclose a material fact. *Dussault v. Am. Int'l Group, Inc.*, 123 Wn. App. 863, 872, 99 P.3d 1256 (2004). The Aasebys have not shown that Farmers owed them any duties—contractual, fiduciary, or otherwise.

The Aasebys suggest a new rule that does not require proof of a pre-existing duty to disclose before a third party claimant may establish fraudulent concealment. Br. of Appellant at 25-26. Simply put, that is not the law. Proof of a duty to disclose is required to prove fraudulent concealment. *Oates v. Taylor*, 31 Wn.2d 898, 903, 199 P.2d 924 (1948). "Absent an affirmative duty to disclose material facts, a defendant's silence does not constitute fraudulent concealment or misrepresentation." *Crisman v. Crisman*, 85 Wn. App. 15, 22, 931 P.2d 163 (1997).

The trial court, then, properly dismissed the Aasebys' claims of fraud.

Outrage. The Aasebys next argue that Farmers' conduct in this case is nothing short of outrageous. Specifically, they complain about Farmers' filing its declaratory action six years after the date of the accident, failing to include the Aasebys as parties to the action, and opposing the Aasebys' motion to intervene in the action.

A claim of outrage requires proof of: "(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) [the Aasebys'] resulting actual severe emotional distress." *Womack v. Rardon*, 133 Wn. App. 254, 260-61, 135 P.3d 542 (2006).

To be considered outrageous and extreme, the conduct complained of must be so outrageous in character and so extreme in degree as to be indecent, atrocious, and intolerable in a civilized community. *Kloepfel v. Bokor*, 149 Wn.2d 192, 196, 66 P.3d 630 (2003). Outrageous and extreme conduct does not include mere insults, humiliation, threats, annoyances, petty cruelties, or other trivialities. *Id.*

Whether a course of conduct is sufficiently outrageous to result in liability is generally a question of fact determined by the jury. *Chambers-Castanes v. King County*, 100 Wn.2d 275, 289, 669 P.2d 451 (1983); *Stansfield v. Douglas County*, 107 Wn. App. 1, 15, 27 P.3d 205 (2001). Summary judgment is, nevertheless, proper if reasonable minds could reach only one conclusion. *See Birklid v. Boeing Co.*, 127 Wn.2d 853, 867, 904 P.2d 278 (1995) (court initially determines if reasonable minds could differ on whether conduct is sufficiently extreme). To determine whether reasonable minds could reach only one conclusion, we must consider:

(1) The relationship between the parties,

(2) Whether the Aasebys were particularly susceptible to emotional distress, and if Farmers knew of this fact,

(3) Whether Farmers' conduct may have been privileged under the circumstances,

(4) Whether the degree of emotional distress caused by Farmers was severe as opposed to mere annoyance, inconvenience, or normal embarrassment, and

(5) Whether Farmers was aware that there was a high probability that its conduct

> would cause severe emotional distress and proceeded in a conscious disregard of that probability.

Spurrell v. Bloch, 40 Wn. App. 854, 862-63, 701 P.2d 529 (1985).

Of course, Farmers had the right to sue for a declaration of noncoverage for the Aasebys' loss. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 203 n.4, 11 P.3d 762, 27 P.3d 608 (2000) ("[T]he Uniform Declaratory Judgments Act [ch. 7.24 RCW] authorizes courts to declare private rights, such as the validity or construction of deeds, wills, and contracts."). And Farmers and the Aasebys have no legal relationship, at least none that would give rise to some obligation on Farmers' part to protect the Aasebys' sensibilities. The usual procedural posture for these third party claims is that the injured third party takes a judgment against the insured and agrees not to execute in exchange for the assignment of any claims that the insured may have against his own insurance company. *See Green v. City of Wenatchee*, 148 Wn. App. 351, 363, 199 P.3d 1029 (2009). And Farmers and Mr. Vue are parties to the Farmers insurance contract. The Aasebys are not. Also, there is no suggestion in this record that the Aasebys are particularly susceptible to emotional distress. So we conclude that filing a declaratory judgment action against its own insured without naming the Aasebys is hardly the outrageous conduct contemplated by this cause of action. *Kloepfel*, 149 Wn.2d at 203 (defining severe emotional distress as distress that no reasonable man could be expected

to endure). Indeed, the Aasebys were not even bound by the default declaratory judgment until they voluntarily became parties to the action.

Farmers' declaratory judgment action was also timely. The Uniform Declaratory Judgments Act includes no timeliness provisions; the action must be prosecuted within a reasonable time. *Cary v. Mason County*, 132 Wn. App. 495, 500-01, 132 P.3d 157 (2006). And "'[w]hat constitutes a reasonable time is determined by analogy to the time allowed for appeal of a similar decision as prescribed by statute, rule of court, or other provision.'" *Id.* (emphasis omitted) (internal quotation marks omitted) (quoting *Brutsche v. City of Kent*, 78 Wn. App. 370, 376-77, 898 P.2d 319 (1995)).

A party has six years to bring an action upon a written contract or for liability arising out of a written agreement. RCW 4.16.040(1). Here, Farmers filed its declaratory judgment action within months after discovering that a claim would be asserted against it. It filed its action on September 25, 2006, less than six years after the Aaseby-Vue accident of October 20, 2000. Farmers' action, then, was not outrageous or extreme; it was timely and permitted by law. RCW 7.24.020; RCW 4.16.040(1).

The Aasebys also assert that failing to include them as parties to the declaratory action was outrageous. They contend, without analysis, that they were necessary parties to the action and should have been included under RCW 7.24.110.

While the Aasebys are certainly a proper party to the declaratory judgment action,

they were not a necessary party. We will not conclude that genuine issues of material fact remain over whether the Farmers' declaratory judgment action itself amounted to outrageous conduct because of the way that Farmers chose to prosecute the action.

The Aasebys also claim that opposing their motion to intervene was outrageous and extreme conduct. Of course, it is not. It is legal argument. Parties regularly oppose motions by other parties. Indeed, the adversarial system relies on the parties to bring forth their best arguments in support of a premise so that a court can decide a matter after considering a full discussion of the wisdom of the issue. *Hanson v. City of Snohomish,* 121 Wn.2d 552, 572, 852 P.2d 295 (1993) (Utter, J., dissenting).

The trial court properly dismissed the Aasebys' claim of outrage on summary judgment.

Estoppel, Laches, Waiver, and Unconscionability

The Aasebys next contend that Farmers' intentional torts preclude Farmers from now denying Mr. Vue coverage under the doctrines of estoppel, waiver, laches, bad faith, or unconscionability. They claim Farmers acted unconscionably and in bad faith (under CR 11(a)) because Mr. Vue claimed to be pro se and filed an untimely but properly formatted answer. They allege that waiver, laches, collateral estoppel, and unconscionability estop Farmers from suing for declaratory relief because it waited six years to file its action and, therefore, failed to timely enforce or preserve its right to deny

coverage.

Standing. The Aasebys cite to two Washington cases for the proposition that they have, or should have, standing to assert these affirmative defenses: *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), and *Gould v. Mut. Life Ins. Co. of N.Y.*, 37 Wn. App. 756, 683 P.2d 207 (1984).

In *Tank*, the court held that a third party claimant lacks standing to sue an insurer for per se violations of the Consumer Protection Act (CPA), chapter 19.86 RCW, and unfair claims settlement practices under WAC 284-30-300 through -410. 105 Wn.2d at 393-94. In *Gould*, the court concluded that an intended beneficiary under an insurance policy had standing to assert a per se CPA violation against an insurer that wrongfully refused to pay a claim. 37 Wn. App. at 759. The *Tank* court determined that its holding was consistent with the *Gould* holding because an intended beneficiary, like an insured, is owed a direct contractual obligation by the insurer. *Tank*, 105 Wn.2d at 394-95.

Neither case, however, addresses whether a third party claimant may contest a default judgment by asserting affirmative defenses against an insurer. And the Aasebys are third party claimants, not insured parties to the insurance contract, insisting on the benefits of that contract.

However, other jurisdictions allow third party claimants to contest an insurer's request for a declaration of no coverage where default judgment has been entered against

the insured. *Hawkeye-Security Ins. Co. v. Schulte*, 302 F.2d 174, 177 (7th Cir. 1962); *State Farm Mut. Auto. Ins. Co. v. Jackson*, 736 F. Supp. 958, 960 (S.D. Ind. 1990); *Allstate Ins. Co. v. Hayes*, 442 Mich. 56, 67-68, 499 N.W.2d 743 (1993). The cases reason that an injured party has the most to lose from a judgment for the insurer and, therefore, has the most incentive to litigate the action. *Schulte*, 302 F.2d at 176-77; *Jackson*, 736 F. Supp. at 960; *Hayes*, 442 Mich. at 72-73. They also recognize that an injured party should be able to assert defenses against an insurer's petition for a declaration of noncoverage because prohibiting such a contest would render meaningless an injured party's right to participate in a declaratory action once joined. *Schulte*, 302 F.2d at 176-77; *Jackson*, 736 F. Supp. at 960. These cases provide persuasive support for recognizing standing here. We conclude, then, that the Aasebys have standing to challenge Farmers' default declaratory judgment.

We will, then, address each defense they asserted.

Waiver. Waiver is the intentional relinquishment or abandonment of a known right. *Buchanan v. Switzerland Gen. Ins. Co.*, 76 Wn.2d 100, 108, 455 P.2d 344 (1969); *R.A. Hanson Co. v. Aetna Cas. & Sur. Co.*, 15 Wn. App. 608, 613, 550 P.2d 701 (1976).

The Aasebys rely on *Detweiler v. J.C. Penney Casualty Insurance Co.* to support their argument that Farmers waived its right to deny coverage under its policy. 110 Wn.2d 99, 751 P.2d 282 (1988). The *Detweiler* court determined that the insurer waived

its right to arbitrate liability and damage issues by making no attempt to resolve a coverage dispute by arbitration or a declaratory judgment action within four years of an injury. *Id.* at 112-13. The right to arbitrate, however, is not at issue in this case. And Farmers filed a declaratory judgment action about two months after Mr. Vue first questioned coverage. *Detweiler* is, then, factually distinguishable and does not support waiver by Farmers.

Moreover, an insurer cannot waive policy coverage issues when the policy does not provide coverage. *See Transamerica Ins. Group v. Chubb & Son, Inc.*, 16 Wn. App. 247, 253, 554 P.2d 1080 (1976) (holding that an insurer could not waive the right to deny coverage if there was no coverage to deny). Farmers could not have waived its right to deny coverage if its policy did not provide coverage. And the record here shows that the Farmers policy does not cover the vehicle Mr. Vue was driving at the time of the collision. The trial court properly dismissed the Aasebys' claim of waiver.

Laches. Laches requires proof that: (1) Farmers knew or should have known of a cause of action against Mr. Vue, (2) Farmers' delay in commencing that action was unreasonable, and (3) Mr. Vue was damaged by Farmers' unreasonable delay. *See Kelso Educ. Ass'n v. Kelso Sch. Dist. No. 453*, 48 Wn. App. 743, 750, 740 P.2d 889 (1987).

Again, a party must seek declaratory relief within a "'reasonable time as measured by an analogous statute of limitations.'" *Neighbors & Friends of Viretta Park v. Miller*,

87 Wn. App. 361, 372, 940 P.2d 286 (1997) (quoting *Summit-Waller Citizens Ass'n v. Pierce County*, 77 Wn. App. 384, 397, 895 P.2d 405 (1995)). The statute of limitations on a contract action is six years. RCW 4.16.040(1). Farmers filed its declaratory action against Mr. Vue less than six years after the Aaseby-Vue accident and within months of the time Mr. Vue first questioned coverage. The action was commenced within a reasonable time.

Moreover, the Aasebys show no prejudice. They asserted their claim of coverage. They litigated the coverage issue to conclusion and simply lost on that issue.

Collateral Estoppel. Collateral estoppel would preclude Farmers from contesting coverage under its liability policy if:

(1) The court in *Aaseby v. Vue* decided the issue;

(2) The court entered a final judgment on the merits;

(3) Mr. Vue, the defendant here, was a party to *Aaseby v. Vue*; and

(4) Applying the doctrine would not be unjust to Farmers.

Lenzi v. Redland Ins. Co., 140 Wn.2d 267, 279, 996 P.2d 603 (2000).

To state the required elements is to state the obvious: Farmers is not collaterally estopped from pursuing a declaration of no coverage. "[C]ollateral estoppel precludes only those issues that have actually been litigated and determined." *McDaniels v. Carlson,* 108 Wn.2d 299, 305, 738 P.2d 254 (1987); *accord*, *Schwindt v. Commonwealth*

Ins. Co., 140 Wn.2d 348, 360, 997 P.2d 353 (2000) (concluding that collateral estoppel did not apply because the policy was not at issue in the separate action). Coverage under the Farmers policy was not at issue in the *Aaseby v. Vue* litigation; no party to that case asked the court to decide whether the Farmers policy covered the Aaseby-Vue accident until the case was reopened. Moreover, the court in *Aaseby v. Vue* has not entered a final judgment on the merits; the parties settled their dispute and voluntarily dismissed their suit but the court has since set aside the dismissal and reopened the case. Collateral estoppel, then, did not prohibit Farmers from seeking a declaratory ruling on the coverage issue under its policy. *McDaniels*, 108 Wn.2d at 305. The trial court properly dismissed this claim as a matter of law.

Unconscionability. Finally, unconscionability is a doctrine by which courts may deny enforcement of all or part of an unfair or oppressive contract based on abuses during the process of forming a contract or abuses within the actual terms of the contract itself. *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 458-59, 45 P.3d 594 (2002). The Aasebys have not alleged that Mr. Vue's contract of insurance with Farmers is somehow unconscionable.

The Aasebys, instead, contend that Farmers *acted* unconscionably by filing its declaratory judgment action nearly six years after the accident, allegedly to conceal "the actual policy" and deny coverage. These actions and allegations do not support a claim

of unconscionability. The trial court, then, properly dismissed the Aasebys' claim of unconscionability.

The trial court properly dismissed the Aasebys' complaint in intervention and properly granted Farmers' motion for summary judgment.

Attorney Fees

Finally, the Aasebys request attorney fees based on a number of statutes or rules. They have not prevailed, however, and are not entitled to fees. RAP 18.1(a).

We affirm the judgment of the trial court and deny fees.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Kulik, A.C.J.

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Korsmo, J.